No. 17865

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEON J. GRANT and WALTER F. WISSMAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' SUPPLEMENTAL BRIEF

FILED PURSUANT TO LEAVE OF COURT

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In 1958, this Court observed that the law of obscenity was "shifting" and was "in a state of flux". Eastman Kodak Co. v. Hendricks, 362 F.2d 393 (9 Cir. 1958). This state of affairs has not, of course, changed since the indictment was returned herein in September 1960, or since oral argument some three and one-half years ago.

I

THE INDICTMENT, AND EACH AND EVERY COUNT THEREOF, FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES. THE CONVICTION UNDER THE VOID INDICTMENT DEPRIVES APPELLANTS OF THEIR LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW AND ABRIDGES FREEDOMS OF SPEECH AND PRESS.

Appellants previously argued that the failure to name the allegedly offending books in the indictment rendered the indictment fatally defective. As a minimum, due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial. Russell v. United States, 369 U.S.749, 82 S.Ct.1038, 8 L.Ed.2d 240; United States v. Lamont, 236 F.2d 312 (2 Cir. 1956); United States v. Cruikshank, 92 U.S.542, 23 L.Ed.588. Appellee seems to concede that if the names of the books were not given in response to appellants' demand by a bill of particulars, appellants would be correct in their assertion that they were not adequately advised of the charge they were called upon to defend. Thus, appellee states in its brief (p.12) that "appellants availed themselves of their right to seek a bill

of particulars...and obtain thereby an exact description and identification of the items alleged to have been mailed for each count of the indictment". The trouble with appellee's position is that a bill of particulars cannot cure an otherwise defective indictment. Russell v. United States, supra. Assuming, arguendo, however, that the indictment herein must be read together with the bill of particulars, the indictment is still fatally defective.

In response to appellants' demand for a bill of particulars, appellee alleged that:

> "The 'books, pamphlets and other publications' referred to in each count of the indictment were deemed obscene by the standards of the community within the geographic limits of the Central Division of the Southern District."
>
> (C.T.59-61.)

Heretofore, appellants argued that the use of a local rather than a national geographic area was in violation of constitutional standards enunciated by the United States Supreme Court in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct.1432, 8 L.Ed.639, and followed in Excellent Publications, Inc. v. United States, 309 F.2d 362 (1 Cir. 1962).

Since then, the Supreme Court decided Jacobellis v. Ohio, 378 U.S.184, 84 S.Ct.1676, 12 L.Ed.2d 793, making plain

that even in State cases, a national standard was required, rather than a local one. The Court there said:

> "It has been suggested that the 'contemporary community standards' aspect of the Roth test implies a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises. This is an incorrect reading of Roth....
>
> * * *
>
> "We do not see how any 'local' definition of the 'community' could properly be employed in delineating the area of expression that is protected by the Federal Constitution. MR. JUSTICE HARLAN pointed out in Manual Enterprises, Inc. v. Day, supra, 370 U.S., at 488, 82 S.Ct., at 1437, that a standard based on a particular local community would have 'the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency. Cf.

Butler v. Michigan, 352 U.S.380, 77 S.Ct. 524, 1 L.Ed.2d 412.' It is true that Manual Enterprises dealt with the federal statute banning obscenity from the mails. But the mails are not the only means by which works of expression cross local-community lines in this country. It can hardly be assumed that all the patrons of a particular library, bookstand, or motion picture theatre are residents of the smallest local 'community' that can be drawn around that establishment. Furthermore, to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places. It would be a hardy person who would sell a book or exhibit a film anywhere in the land after this Court had sustained the judgment of one 'community' holding it to be outside the constitutional protection. The result

would thus be 'to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.' Smith v. California, 361 U.S.147, 154, 80 S.Ct. 215, 219, 4 L.Ed.2d 205."

(378 U.S. at 192, 193-194.)

It follows that since national standards are required in a State case, a fortiori, they are required in a federal prosecution. See, Haldeman v. United States, 340 F.2d 59 (10 Cir. 1965).

It thus appears that the indictment, as amplified by the bill of particulars, does not charge the commission of an offense against the United States since it is no crime to mail books which offend only local standards.

In Russell v. United States, supra, the Supreme Court observed that the "vice which inheres in the failure of an indictment...to identify the subject under inquiry is ...the violation of the basic principle 'that the accused must be apprised by the indictment, with reasonably certainty, of the nature of the accusation against him'.... A cryptic form of indictment...requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand

on appeal to fill in the gaps of proof by surmise or conjecture" (369 U.S. at 766).

In A Book etc. v. Attorney General of Massachusetts, 86 S.Ct.975, Mr. Justice Brennan said that Roth v. United States, 354 U.S.476, 77 S.Ct.1304, 1 L.Ed.2d 1498, as elaborated in subsequent cases, contains "three elements" which "must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social importance" (86 S.Ct. at 977).

It thus appears that the crime of "obscenity" contains three separate and distinct essential elements. Where, as here, a federal statute has been interpreted in a particular fashion, in the United States Supreme Court, in order to save itself from constitutional infirmity, an indictment must allege these essential elements. Russell v. United States, 369 U.S.749, 82 S.Ct.1038, 8 L.Ed.2d 240.

If it be argued that "a charge that books...are obscene necessarily refers to and incorporates the legal definition of obscenity" (United States v. Luros, 243 F.Supp. 160, 166 [D.C. N.D. Iowa W.D. 1965]), appellee is not aided. At the time of the indictment herein, it was not understood by the United States Attorney, the trial court or the grand

jury that the constitutional standard was measured by a national rather than a local standard. Nor was it then understood that a work could not be condemned as obscene unless it was utterly without redeeming social importance. Where the law is in a state of flux and the constitutional standards for determining obscenity are "shifting", it is essential, it is respectfully submitted, to allege the constitutional standards as they are then understood in the indictment. Otherwise, a defendant might be charged and tried on one theory and convicted under another theory in clear violation of due process of law. Cole v. Arkansas, 333 U.S.196, 68 S.Ct.514, 92 L.Ed.644; Russell v. United States, 369 U.S. 749, 82 S.Ct.1038, 8 L.Ed.2d 240.

II

THE STATUTE - 18 U.S. CODE §1461, AS CONSTRUED AND APPLIED BY THE TRIAL COURT, ABRIDGES APPELLANTS' EXERCISE OF FREEDOMS OF SPEECH AND PRESS, AND ARBITRARILY DEPRIVES APPELLANTS OF THEIR LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FIRST AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Statute, as Construed and Applied by the Trial Court, To Authorize the Jury to Measure the Books by Application of the Standards of the Local Community Rather Than the National Community, Abridges Appellants' Constitutional Rights to Freedoms of Speech and Press and Due Process of Law.

Appellee labored for ten pages in its brief (pp. 18-28) to prove that local standards, not national standards, were to be applied. The United States Supreme Court has settled this argument, beyond dispute, against appellee. Jacobellis v. Ohio, 378 U.S.184, 84 S.Ct.1676, 12 L.Ed.2d 793; Manual Enterprises, Inc. v. Day, 370 U.S.478, 82 S.Ct.1432, 8 L.Ed.639.

B. The Statute, as Construed and Applied by the Trial Court, to Authorize the Jury to Condemn the Books as Obscene, Without Advising the Jury that a Book Could Not be So Condemned Unless It Was Utterly Without Redeeming Social Importance, Abridges Appellants' Constitutional Rights to Freedoms of Speech and Press and Due Process of Law.

At no point did the trial court advise the jury that a work could not be condemned as obscene unless it was utterly without redeeming social importance. This essential

element of the offense of obscenity was first clearly articulated by the Supreme Court in Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct.1676; and re-enforced by the Supreme Court in A Book etc. v. Attorney General of Massachusetts, 86 S.Ct. 975.

It is true that appellants have not heretofore made complaint about this omission. But the trial, and argument on appeal, both preceded the decision of Jacobellis v. Ohio, supra.

In Morris v. United States, 156 F.2d 525 (9 Cir. 1946), this Court reversed a conviction where the trial court failed to instruct on an essential element of the offense even though no request was made for such an instruction. This Court said:

> "...It is our opinion that the trial court committed fatal error in failing to instruct the jury on the statutes and regulations governing the offenses charged against appellant. No assignment of error was made at the trial covering this claimed error, but we consider it because... '[w]here life or liberty is involved an appellate court may notice a serious error which is plainly prejudical even though it was not called to the attention of the trial

court in any form.' In a criminal case, it is always the duty of the court to instruct on all essential questions of law, whether requested or not....

"The court did not define the offense of which the appellant was charged and being tried, and the jury was given no opportunity of applying the facts to the law...."

(156 F.2d at 527-528.)

In Bollenbach v. United States, 326 U.S.607, 66 S.Ct.402, 90 L.Ed.350, Mr. Justice Frankfurter dismissed the Government's argument that the Court should not reverse because the defendant was plainly guilty. In this regard, Mr. Justice Frankfurter said:

"...[I]t may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards for criminal trials in the federal courts."

(326 U.S. at 614.)

III

THE JUDGMENT OF CONVICTION, WHICH RESTS ON NO EVIDENCE OTHER THAN THE CHARGED BOOKS THEMSELVES, DEPRIVED APPELLANTS OF A FAIR TRIAL, OF THEIR LIBERTIES AND PROPERTY WITHOUT DUE PROCESS OF LAW, AND ABRIDGED APPELLANTS' FREEDOMS OF SPEECH AND PRESS CONTRARY TO THE PROVISIONS OF THE FIRST, FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee made no attempt by evidence to prove that the books here involved went substantially beyond customary limits of candor in the description or representation of matters pertaining to sex, in the Nation as a whole, or at all. It presented no evidence to show that the predominant appeal of the books was to a shameful or morbid interest in sex. It presented no evidence to show that the books were utterly without social importance.

Where the "transcendent value of speech" is involved, due process requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech". Speiser v. Randall, 357 U.S.513, 526, 78 S.Ct.1332, 2 L.Ed.2d 1460; Freedman v. Maryland, 380 U.S.51, 85 S.Ct. 734; New York Times Co., et al. v. Sullivan, 376 U.S.254,

271, 277-280, 283-288, 84 S.Ct.710, 11 L.Ed.2d 686; Thompson v. City of Louisville, 362 U.S.199, 206, and cases cited in fn.13, 80 S.Ct.624, 4 L.Ed.654.

Books and writings do not in themselves prove such elements as contemporary standards, prurient interest or social importance. Whether a book exceeds limits of candor, or appeals to a shameful or morbid interest in sex, or is utterly worthless, can only be established by evidence and not by conjectures, presumptions or subjective reactions. Tot v. United States, 319 U.S.463, 63 S.Ct.1241, 87 L.Ed. 1519; New York Times Co., et al. v. Sullivan, 376 U.S.254, 84 S.Ct.710, 11 L.Ed.2d 686; United States v. Romano, 382 U.S.136, 86 S.Ct.279.

As the Supreme Court has warned on different occasions, and as the Court of Appeals for the Second Circuit made clear in United States v. Klaw, et al., 350 F.2d 155 (2 Cir. 1965), courts and juries in obscenity prosecutions do not sit to act as censors of material personally distasteful to them.

Without proof by evidence, reviewable by an appellate court, that limits of candor have actually been exceeded, or that a writing appeals to no other interest but prurient interest, or is without any importance at all, there is little assurance, it is submitted, that non-obscene writings can be protected. As was stated by the Court of Appeals in Klaw, "it is the record and not our feelings that

must control.... Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity" (350 F.2d at 170).

To permit suppression and punishment without proof of the essential ingredients of an offense, ingredients which are made necessary by the requirements of the Constitution, undermines a broad category of rights guaranteed by the free speech and press and due process provisions of the Constitution. The right to fair notice and hearing, the right of confrontation and the assistance of counsel are meaningless and constitute a mere gloss when the prosecution is not required to prove the elements of an offense. Pointer v. Texas, 380 U.S.400, 85 S.Ct.1065; Douglas v. Alabama, 380 U.S.415, 85 S.Ct.1074; Brookhart v. Janis, 86 S.Ct.1245; Turner v. Louisiana, 379 U.S.466, 85 S.Ct.546. Without proof of the elements of the offense of obscenity, "it would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured." United States v. Klaw, et al., 350 F.2d at 170.

The only evidence on the issue of obscenity was adduced by appellants. They introduced a large number of books generally circulated in the area where they conducted their business (R.T.229; Exhibits A-1 through A-9); books

and magazines generally offered for sale and purchased by the witness Shinbane (R.T.486; Exhibits B-1 through B-53, except Exhibits B-29 and B-30); books purchased in the Court House at or about the time of the trial (R.T.487; Exhibits C-1 through C-28); men's magazines, including those containing various depictions of nudity (R.T.228, 489; Exhibits E-1 through E-53; Exhibits F-1 through F-2); true confession-type magazines (R.T.489; Exhibits G-1 through G-13); book advertisements (R.T.219, Exhibits H-1 through H-18); newspaper advertisements for burlesque and movies (R.T.490; Exhibits I-1 through I-15); photographs of theatre marquees (R.T.490; Exhibits J-1 through J-15); books entitled Tropic of Cancer by Miller (Exhibit K-2), Advertisements for Myself by Mailer (Exhibit K-3), and The Carpetbaggers by Robbins (Exhibit L).

A comparison of the books charged here with this material, all of which was shown to be freely and openly circulating, demonstrates conclusively that the charged books do not go substantially beyond customary limits of candor. Moreover, appellants called a duly qualified expert, Bernarr Mazo, who testified that the charged books do not go beyond customary limits of candor in the description or representation of matters pertaining to sex (R.T. 453; 479). He also testified that the books would not appeal to the prurient interest of the average person but that, on

the contrary, the books appealed to the normal curiosity the average person has in all matters involving the human condition, including sex (R.T.341).

Comparing the three charged books with Tropic of Cancer (see, Grove Press, Inc. v. Gerstein, 378 U.S.577, 84 S.Ct.1909, 12 L.Ed.2d 1305), the witness Mazo testified that these books dealt with sex more vividly and with greater variety than the three charged books. In short, the witness testified that the books were well within the customary limits of candor.

Thus, we have a record where appellee totally defaults in adducing evidence on the essential elements of the offense, and appellants' uncontradicted evidence demonstrates conclusively that the charged books do not meet the constitutional tests of obscenity enunciated by the United States Supreme Court.

So far as the record here is concerned, nothing in the production, sale or publicity relative to the books herein involved amounts to the "pandering" found in the record by the United States Supreme Court in Ginzburg v. United States, 86 S.Ct.942. The total evidence against appellants was a written stipulation of facts establishing that certain advertisements and books were mailed and received (C.T.69), plus the testimony of a postal inspector and a Los Angeles Police Department Sergeant. The postal inspector

identified the advertisements and books involved in the case and an affidavit executed by appellants (R.T.76-100). He also testified that appellants had each told him that they read some, but not all, of the books they distributed by mail. Sgt. DeCamp of the Los Angeles Police Department testified that appellant Grant told him that he had assisted in the preparation of the Continental Publications brochure. This testimony, and the Exhibits, was appellee's entire case. Moreover, this case, unlike Ginzburg, was tried to a jury and not to a court. The jury never was presented with any issue of "pandering" and no such issue was ever decided by the trier of facts. See, DeJonge v. Oregon, 299 U.S.353, 57 S.Ct.255, 81 L.Ed.278; Cole v. Arkansas, 333 U.S.196, 68 S.Ct.514, 92 L.Ed.644. See also, Parr v. United States, 363 U.S.370, 80 S.Ct.1171, 4 L.Ed.2d 1277.

CONCLUSION

The motions of appellants for judgments of acquittal and in arrest of judgment should have been granted by the District Court. The judgment of conviction should be reversed with instructions to dismiss the indictment.

Respectfully submitted,

Stanley Fleishman

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Attorney for Appellants

CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

STANLEY FLEISHMAN

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1680 North Vine Street, Hollywood, California 90028. On the 26th day of May, 1966, I served the within APPELLANTS' SUPPLEMENTAL BRIEF FILED PURSUANT TO LEAVE OF COURT on the appellee in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Hollywood, California, addressed as follows:

Francis C. Whelan, United States Attorney
Thomas R. Sheridan, Assistant U. S. Attorney,
Chief, Criminal Section,
David Y. Smith, Assistant U. S. Attorney
600 Federal Building
Los Angeles, California 90012.

I certify that the foregoing is true and correct.

Executed this 26th day of May, 1966 at Hollywood, California.

Yvonne Burroughs
YVONNE BURROUGHS

Subscribed and sworn to before me
this 26th day of May, 1966

Evaleen Saquin
Notary Public in and for said
County and State.

EVALEEN SAQUIN
My Commission Expires June 18, 1967